

## **EXHIBIT 2**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action  
No. 04-10298-WGY

\* \* \* \* \*

MAUREEN SULLIVAN-STEMBERG,

Plaintiff,

v.

**MOTION HEARING**

TURNER CONSTRUCTION COMPANY and  
NISHIMATSU CONSTRUCTION CO., LTD.,

Defendants.

\* \* \* \* \*

BEFORE: The Honorable William G. Young,  
District Judge

APPEARANCES:

LAW OFFICE OF JEFFREY S. GLASSMAN, LLP (By Neil S.  
Cohen, Esq.) 1 Beacon Street, Suite 3333, Boston,  
Massachusetts 02108, on behalf of the Plaintiff

PEPE & HAZARD, LLP (By Daniel J. Klau, Esq.), 25  
Asylum Street, Hartford, Connecticut 06103, on behalf  
of Turner Construction Company, Inc.

1 Courthouse Way  
Boston, Massachusetts

July 15, 2004

1 THE CLERK: Calling Civil Action 04-10298,  
2 Sullivan-Stemberg v. Turner Construction.

3 THE COURT: Would counsel identify themselves.

4 MR. COHEN: Good morning -- actually good  
5 afternoon, your Honor. Neil Cohen for the plaintiff,  
6 Maureen Sullivan-Stemberg.

7 MR. KLAU: Good afternoon, your Honor. Daniel  
8 Klau for the defendant, Turner Construction.

9 THE COURT: How do you, it's the defendant's  
10 motion here, but how do you get beyond the statute of  
11 repose?

12 MR. COHEN: I think with what I've said in my  
13 brief, your Honor. I think if you read my brief, I pretty  
14 much concede the negligence aspect. I don't think I do get  
15 past --

16 THE COURT: Right.

17 MR. COHEN: -- that according to research.

18 The implied warranty and the express warranty I do  
19 take issue with. Number one, the implied warranty I don't  
20 believe necessarily has the same elements as the negligence  
21 claim. And that could be -- based on what I put in the  
22 brief, and I didn't give you specific details, but it's  
23 based on information and belief that improper flashing or  
24 in fact no flashing was used between the floors of the  
25 apartment building. That's materials. And therefore from

1 our point of view if they didn't use proper materials --

2 THE COURT: But it's not -- it's a motion to  
3 dismiss so I have to take everything your way, and I do.

4 MR. COHEN: Yes.

5 THE COURT: What about a Massachusetts case  
6 Sullivan v. Iantosca, 409 Massachusetts 796 at 800: Action  
7 for breach of implied covenant of good workmanship barred  
8 by the statute of repose.

9 MR. COHEN: Well, again, the implied warranty  
10 claim I recognize is difficult from the plaintiff's  
11 standpoint on, on that issue, on the statute of repose,  
12 because there has been, also the Anthony's Pier Four case I  
13 believe also read it as being --

14 THE COURT: Right. How about express warranty?  
15 Where's the promise? Where's the express promise?

16 MR. COHEN: Well, I don't know, Judge, because I  
17 don't have the contract between Turner and the Flagship  
18 Wharf Condominium Association, and hence, if I don't have  
19 the contract, I don't know what promises were made within  
20 it; therefore, it would not be a proper motion for  
21 consideration under dismissal 12(b)(6).

22 In addition, I also have a case here that I  
23 found --

24 THE COURT: Well, I mean, you have to have some  
25 basis for -- you have to plead a promise. And under Rule

1 11 of the Rules of Civil Procedure you have to have a basis  
2 for pleading an express promise. What's your basis?

3 MR. COHEN: Well, the basis is that I believe  
4 there was a contract between Turner as well as --

5 THE COURT: Probably there was. What's the  
6 promise that supports your claim that an express warranty  
7 was breached? Where is it here?

8 MR. COHEN: Well, if I haven't had the contract,  
9 Judge, I don't know how I -- other than the fact that, my  
10 argument is that my client was a third-party beneficiary to  
11 an express promise made by Turner to the condominium  
12 association.

13 THE COURT: But I don't -- you haven't pleaded an  
14 express promise. Now that I press you on it you say you  
15 don't know whether there's an express promise, but you hope  
16 there is and you would like me to deny the motion to  
17 dismiss so you can go on.

18 But I guess, and I think this will save your  
19 rights as much as I can, I hold that your pleading is  
20 inadequate. It doesn't recite an express promise. You  
21 have to be more specific than that and you have to have  
22 some reasonable basis for making that, that claim.

23 Now, if, if those go then the rest goes, doesn't  
24 it? And you would probably have --

25 MR. COHEN: I would have to have done that, yes.

1 THE COURT: Yes. All right. And Nishimatsu, they  
2 stand on the same basis, don't they, so we -- right.

3 All right. I appreciate your candor. The case is  
4 dismissed in its entirety. You have the right to appeal.

5 MR. COHEN: Thank you.

6 (Whereupon the matter concluded.)  
7  
8

9 C E R T I F I C A T E

10

11 I, Donald E. Womack, do hereby certify that the  
12 above proceedings were reported by me stenographically and  
13 this transcript represents a true and accurate  
14 transcription of said proceedings.  
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